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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, F. Donald Zucker and Harry J. Barton, individually and on behalf of all members of a class of customers similarly situated, pray that a Writ of Certiorari issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on January 24, 1975.

OPINIONS BELOW.

The decision and order of the District Court for the Eastern District of Pennsylvania printed in Appendix A hereto is reported at 373 F. Supp. 748 (1974). The judgment order of the United States Court of Appeals for the Third Circuit is printed at Appendix B hereto and is unreported.

JURISDICTION.

The judgment order of the United States Court of Appeals for the Third Circuit was entered on January 24, 1975 (Appendix B). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Was it not a violation of due process of the fifth and fourteenth amendments to the United States Constitution and title 42 U. S. C. § 1983 for defendants Bell Telephone Company of Pennsylvania, a public utlity, and the Public Utility Commission of Pennsylvania to provide inadequate notice to plaintiffs of a hearing prior to the institution of new rates, in light of a state statutory requirement to a hearing?

Was it not error for the courts below to preclude plaintiffs from invoking federal jurisdiction, by virtue of the Johnson Act, 28 U. S. C. § 1342?

Was it not error for the courts below to preclude plaintiffs from invoking federal jurisdiction on the basis of comity?

STATUTES INVOLVED.

The statutory provisions involved are the Fifth and Fourteenth Amendments of the United States Constitution; 42 U. S. C. § 1983; the Johnson Act, 28 U. S. C. § 1342; 66 P. S. 748; 66 P. S. 1141-1153; and 66 P. S. 1341.

STATEMENT OF THE CASE.

Plaintiffs, F. Donald Zucker and Harry J. Barton have brought this action on behalf of themselves and as representatives of a class comprised of thousands of customers of defendant, Bell Telephone Company of Pennsylvania.

On December 3, 1970, Bell filed with the Pennsylvania Public Utility Commission (PUC) requests for increases and changes in rates for local telephone service.

On December 14, 1971, the PUC approved a new rate of $.50 per month charge for private unlisted numbers.

The only direct notice to customers of Bell of the filing for increases and changes in rates was through a letter dated December 3, 1970, signed by William S. Cashol, Jr., president of Bell. The notice refers to increases and changes in rates for local telephone service but it does not direct the customers' attention to new rates or namely, the fact that there will be a new rate charged for unlisted telephones. There was no such rate prior to December 14, 1971. Although hearings before the PUC required 15 days, producing 2,683 pages of testimony and 154 exhibits, and although 20 formal complaints were filed, not one customer appeared at the hearings to examine, object or question Bell about the new rate proposed for an unlisted telephone number service. In fact, less than twelve pages of testimony were devoted to this rate, although it was calculated to produce close to 4.4 million dollars in revenue.

Plaintiff, Dr. Donald Zucker, is associate professor of political science at Ursinus College. He has an unlisted telephone to prevent unwarranted invasions to his privacy by nuisance calls, telephone solicitations, and disturbing phone calls.

Plaintiff, Harry J. Barton, has a tenth grade education. He has an unlisted number to prevent harassing and

threatening telephone calls by creditors and telephone solicitors.

In both cases, an unlisted telephone number has granted the plaintiffs' privacy while affording them a communication media for their own and their family's well being and safety.

Neither plaintiff was aware that Bell was seeking to establish a new rate by its filing with the PUC on December 3, 1970. The notice of Bell, although in conformity with the existing PUC regulations, was not reasonably calculated to inform and apprise Bell customers of the new rate proposed or of their right to a hearing to protest and contest the proposed unlisted telephone number rate.

Subsequent to the December 3, 1970 filing and notice, the PUC changed its notice regulations to provide a more complete disclosure of rate increases, revisions, changes and new tariffs requested, together with a notice of how to file a complaint and obtain the opportunity for a full hearing before the PUC. Therefore it was administratively feasible to give fuller and proper notice for this proposed new rate. The notice sent by Bell to its customers on December 3, 1970 was limited in scope but was in compliance with the effective PUC regulations at the time. The procedure for filing for new rates, apprising and notifying customers, and holding hearings on new tariff filings, is established by state law and the PUC regulations.

REASONS FOR GRANTING THE WRIT.

The Notice Provided by Bell Telephone Company in Conformity With the Existing PUC Regulations, Did Not Reasonably Inform Bell Customers of: a) the Fact That a New Rate Was Being Proposed, and b) That They Possessed a Right to a Hearing to Contest Each Proposed Rate.

The Public Utility Law of Pennsylvania provides for the right of all complainants to participate in a hearing prior to the institution of proposed tariffs.

> "(b) Whenever there is filed with the Commission by any public utility any tariff stating a new rate, the Commission may, either upon complaint or upon its own motion, or upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, and pending such hearing or the decision thereon, the Commission, upon filing with such tariff, and delivering to the public utility affected thereby, a statement in writing of its reasons therefore, may, at any time before it becomes effective, suspend the operation of such rate for a period not longer than six months from the time such rate would otherwise become effective, and an additional period of not more than three months pending such decision . . .
>
> (c) If, after such hearing, the Commission finds any such rate to be unjust or unreasonable, or in any wise in violation of law, the Commission may determine the just and reasonable rate to be charged or applied by the public utility for the service in question, and shall fix the same by order to be served upon the public utility; and such rates shall thereafter be observed until changed as provided by this act." 66 P. S. §1148(b) and (c).

This provision is an affirmative statement by the Pennsylvania Legislature that a complainant's right to a hearing is a requisite of due process.

In furthering the provisions of the Public Utility Law, § 901 grants to the Public Utility Commission administrative authority in the following manner:

> "The Commission shall have general administrative power and authority to supervise and regulate all public utilities doing business with this commonwealth. The Commission may make such regulations, not inconsistent with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act." 66 P. S. § 1341.

Any regulations prescribed by the Commission must be both consistent with, and operate to further, the clear mandates of the Public Utility Law. Therefore, the notice procedures designed by the commission and utilized by the utility and rate making, must be such as to reasonably enable a consumer to take advantage of his hearing rights.

In the instant case, the regulations required that the utility: 1) keep a file of tariff publications and regulations, and post a notice in its principal office that such may be inspected by any person upon request; 2) post within its offices a notice entitled "New Rates to Become Effective" designating the effected rates; and 3) notify each customer by "written or printed notice" of any increase in rates affecting such customer. Though the utility provided notice which was not inconsistent with these requirements, in practical effect, the public was not provided with information which would enable its members to challenge the rate at issue herein. The notice sent in the mail to Bell customers by Bell's president, William S. Cashol, only discussed changes in rates then existing. It failed to inform

the customer that a *new* rate was being proposed for an unlisted telephone. Noteworthy is the fact that George H. Ruschhaupt, the assistant vice president of Bell, at the Public Utility Commission hearing, did recognize that each customer could be directly contacted with reference to the unlisted telephone number service at issue herein. After the rate was allowed, Bell did in fact contact each customer, expressly referred to the new rate structure, and gave them an opportunity to change their unlisted telephone number to a listed telephone service.

Therefore, of the three forms of notice required by the PUC regulation, the one most calculated to reach the individual consumer—notice sent to each Bell subscriber—was inadequate, misleading, and to those subscribers with unlisted numbers, a futile gesture.

The due process right "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Myer,* 311 U. S. 457, 85 L. ed. 278, 61 Supr. Ct. 339, 132 A. L. R. 1357; *Grannis v. Ordean,* 234 U. S. 385, 58 L. ed. 1363, 34 Supr. Ct. 779; *Priest v. Las Vegas,* 232 U. S. 604, 58 L. Ed. 751, 34 Supr. Ct. 443; *Loller v. Holly,* 176 U. S. 398, 44 L. Ed. 520, 20 Supr. Ct. 410. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean,* 234 U. S. 385, 58 L. Ed. 1363, 34 Supr. Ct. 779, *supra,* and *Cf. Goodrich v. Ferris,* 214 U. S. 71, 53 L. Ed. 914, 29 Supr. Ct. 580. . . . but when notice is a person's due, process which is a mere

gesture is not due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314-15 (1950).

There is no doubt in the law that a hearing with reasonable notice of said hearing must be afforded prior to a deprivation of property under color of state law.[1] In the instant case, notices were sent to Bell subscribers indicating that there would be increases and changes in rates for local telephone service. Newspaper stories dealing with these proposed changes appeared in several communities. However, there was absolutely nothing in any of the notices sent to Bell subscribers indicating new rates for telephone subscribers with unlisted numbers. Therefore, even though there was a general notice mailed to telephone subscribers, there was nothing in that notice to bring the proposed new rates to the attention of subscribers with unlisted numbers.

> "The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who may call it to attention."

Shroeder v. City of New York, 371 U. S. 208, 259, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 315.

The significant decision of this Court in *Goss v. Lopez*, No. 73-898, 43 L. W. 4181 (1975), clarified the source of the due process right. There the court rejected defendant's theory that due process protections cannot be invoked upon

---

1. Both Bell Telephone Co. and the PUC have in this manner acted under color of state law so as to be amenable to the jurisdiction of the federal courts under 42 U. S. C. 1983. *Evans v. Newton*, 382 U. S. 296, 15 L. Ed. 373, 86 Supr. Ct. 486 (1966). See the discussion *infra* regarding the decision of *Jackson v. Metropolitan Edison Co.*

the expulsion of the student because the right to an education at public expense is not a constitutional right. Instead, this Court stated:

> "The Fourteenth Amendment forbids the state to deprive any person of life, liberty or property without due process of law. Protected interests in property are normally 'not created by the Constitution. *Rather they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits. Board of Regents v. Roth,* 408 U. S. 564, 577 (1972)." Id. at p. 4183. (Emphasis supplied)

Therefore, a state, once it has provided requirements for procedural due process, cannot effectively preclude such procedures without violating federal due process. *Plaintiff's right to a hearing in the instant case, secured by 66 P. S. § 1148 cannot therefore be abrogated by inadequate notice without a violation of the Fifth and Fourteenth Amendments.*

The decision in *Jackson v. Metropolitan Edison Co.,* No. 73-5845, 43 L. W. 4110 supports the position of the instant petitioners. In that case, the plaintiff sued a privately owned and operated utility corporation, claiming injunctive relief in damages under 42 U. S. C. § 1983 for termination of her electricity without notice or prior hearing. The determinative issue was whether or not the utility's action could be viewed as action of the state for purposes of the Fourteenth Amendment. Though plaintiff argued that state action was present by virtue of: 1) extensive state regulation, 2) the virtual monopoly status of the defendant, 3) the nature of defendant's service as a public function, and 4) the state's authorization and ap-

proval of the termination procedure, this Court declined to so hold. It was found that the termination provision was in fact not a subject of the PUC's hearing and hence the state could not be viewed as having authorized such procedure. None of the other factors were viewed as sufficient to support plaintiff's position.

In the instant case, the issue focuses on the propriety of the rate making procedure itself. Firstly the PUC has approved the manner of notice herein provided. Secondly, hearings mandated by statute were improperly held in the instant case in light of the inadequate notification afforded consumers. Such a defect tainted the entire proceeding. Thirdly, the subject matter involved herein is the new rate itself, clearly required to be filed and affirmatively approved by the PUC according to 66 P. S. 1141-1153. This stands in contrast to the termination procedure in *Jackson*, where the court stated:

> "As a threshold manner, it is less than clear under state law that Metropolitan was even required to file this provision as part of this tariff or that the Commission would have had the power to disprove it. The District Court observed that the sole connection of the Commission with the regulation was Metropolitan's simple notice filing with the Commission and the lack of any Commission action to prohibit it." 43 L. W. at 4113.

In *PUC v. Pollack*, 343 U. S. 451 (1952), the practices of a privately owned utility, which operated a railway and bus system in the District of Colombia, were found sufficiently colored with governmental authority to make constitutional restrictions upon government action applicable. In that case, the state involvement stemmed from the fact that the PUC, after conducting hearings, affirmatively approved the action which was held to be objectionable.

The same circumstance is involved in the instant matter, and hence petitioners herein appropriately claim relief under 42 U. S. C. § 1983, and the Fourteenth Amendment.

It Was Error for the Courts Below to Preclude Plaintiffs From Invoking Federal Jurisdiction, by Virtue of the Johnson Act, 28 U. S. C. § 1342.

Judicial interference with rate orders promulgated by state agencies is concededly precluded by the Johnson Act, 28 U. S. C. § 1342 (Appendix C). However, the Johnson Act includes four clearly enunciated exceptions: "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a state administrative agency or a rate making body of the state political subdivision, where: 1) jurisdiction is based solely on diversity of citizenship or repugnance of the order to the federal constitution; and 2) the order does not interfere with interstate commerce; and 3) the order has been made after reasonable notice and hearing; and 4) a plain, speedy and efficient remedy may be had in the courts of such state." All four conditions must be met before the Johnson Act can apply, thereby precluding the court's jurisdiction. It is our contention that paragraph 3 of the Johnson Act has not been met inasmuch as reasonable notice of the hearing was not given.

Jurisdiction has been sustained where it appeared that adequate notice and hearing were not given. In *Corporation Commission v. Cary*, 80 L. Ed. 324 (1935), a district court was allowed to restrain an enforcement order of a commission reducing gas rates allegedly violative of constitutional rights where there was an uncertainty of whether relief could be obtained in the state courts because of diametrically opposed decisions.

In *Driscol v. E. D. Light and Power Co.*, 83 L. Ed. 1134 (1939), the District Court sustained jurisdiction in an action to enjoin the enforcement of a rate order of a state public utility, allegedly violative of the Fourteenth Amendment, it being conceded that no remedy in the state courts would satisfy the Johnson Act. See also *Georgia Continental Telephone Co. v. Georgia Public Service Commission*, 8 F. Supp. 434 (N. D. Ga. 1934), and *Preston County Light and Power Co. v. Public Service Commission of West Virginia*, 297 F. Supp. 759 (S. D. W. Va. 1969). Petitioners in the instant action, are, therefore, not precluded from federal jurisdiction of their claim by the Johnson Act.

It Was Error for the Courts Below to Preclude Plaintiffs From Invoking Federal Jurisdiction on the Basis of Comity.

Further, comity or abstention should not be herein applied to oust the federal courts of jurisdiction. There are no issues of state law which are to be construed in such a way that could obviate the constitutional questions arising out of the failure of Bell Telephone to give reasonable notice of its rate hearing. The only issue to be decided is the federal issue arising out of the federal Constitution and for which an action for damages may be brought under 42 U. S. C. § 1983.

> "It is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention, e.g., McNeese v. Board of Education, supra, 373 U. S. at 673-674, 83 S. C. 1433." Wright v. McMann, 387 F. 2d 519 (2nd Cir. 1967), quoted with approval in Moreno v. Henckel, 431 F. 2d 1299, 1301 (5th Cir. 1970).

Plaintiffs have chosen the federal forum to gain vindication of their rights under the Constitution. Due respect

should be given to their choice of a forum. This Court has emphatically stated and restated its concern that the abstention doctrine not be used to defeat vindication of a citizen's constitutional rights before federal courts, *Monroe v. Pape,* 365 U. S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961); *McNeese v. Board of Education,* 373 U. S. 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963); *Zwickler v. Koota,* 389 U. S. 241, 19 L. Ed. 444, 88 S. Ct. 391 (1967):

> "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal court '. . . to guard, enforce and protect every right granted or secured by the Constitution of the United States.'" *Zwickler v. Koota* at p. 248.

And as the Court in *County of Allegheny v. Frank Mashuda Co.,* 360 U. S. 185, 3 L. ed. 2d 1163, 1168 (1959) stated:

> "But the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is no more mystically involved with 'sovereign prerogative' than a state's power to regulate fishing in its waters, Tumor v. Witsell, 334 U. S. 385, 92 L. Ed. 1460, 68 S. Ct. 1156, its power to regulate intrastate trucking rates, Public Utilities Commission v. United States, 355 U. S. 534, 2 L. Ed. 470, 78 S. Ct. 446, a city's power to issue certain bonds without a referendum, Meredity v. Winterhaven, 320 U. S. 228, 88 L. Ed. 9, 64 S. Ct. 7, its

power to license motor vehicles, Chicago v. Atcheson, T. & C. F. R. Co., 357 U. S. 77, 2 L. Ed. 2d 1174, 78 S. Ct. 1060, and a host of other governmental activities carried on by the states and their subdivisions which have been brought into question in the federal district courts despite suggestions that these courts should have stayed their hand pending prior state court determination of state law."

Therefore, the merits of plaintiffs' claim should not have been dismissed under Rule 12(b) of the Federal Rules of Civil Procedure.

CONCLUSION.

This court is requested to review this matter in order to clarify the attributes of the due process requirements in the circumstance where a state affirmatively provides to its citizenry a statutory right to a hearing under its public utility law, while authorizing notification procedures which are not suited to accomplish that end. It is respectfully submitted that the issue herein is of great importance both for its wide effect on the general population and for its expression of the great public interest in having a citizen's voice in utility rate-making procedures.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 72-2460.

F. DONALD ZUCKER AND HARRY J. BARTON, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF A CLASS OF CUSTOMERS SIMILARLY SITUATED

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

AND

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

MEMORANDUM AND ORDER.

GREEN, *J.* March 29, 1974

I.

BACKGROUND.

Plaintiffs, F. Donald Zucker and Harry J. Barton, seek to bring this action against defendant, Bell Telephone

Company of Pennsylvania (hereinafter referred to as "Bell"), and defendant, Pennsylvania Public Utility Commission (hereinafter referred to as the "Commission"), on behalf of themselves and purportedly as representatives of a class comprised of all rate payers of Bell. Plaintiffs summarily assert that this court has jurisdiction pursuant to "the Civil Rights Acts, the United States Constitution, particularly the First, Fifth and Fourteenth Amendments, and the equity powers of the Federal Courts."

On December 3, 1970, Bell, pursuant to Section 308 of the Pennsylvania Public Utility Law, 66 P. S. § 1148, filed with the Commission new tariff sheets and a multipage "Notice" stating the revisions proposed to be made in the rates then in force and the time when the changed rates would go into effect. The tariffs contained a $1.00 per month charge for private number service. In order to determine the reasonableness of the proposed new rates, and in accordance with the Pennsylvania Public Utility Law and the Commission's practice, the Commission suspended the operation of the new rates, and instituted an investigation of them, consolidating therewith for hearing a number of complaints which had been filed with respect to them. Hearings before the Commission required fifteen days, producing 2,683 pages of testimony and 154 exhibits. After this investigation and hearings, the Commission, *inter alia*, expressly rejected the proposed $1.00 per month charge for private number service and indicated that it would accept a charge of 50 cents per month instead. Therefore, Bell's tariffs filed in conformity with the Commission's December 14, 1971 order, contained private number service at 50 cents per month.

In their complaint, plaintiffs claim that the Commission's order of December 14, 1971, accepting a private

number surcharge at a rate of 50 cents per month for each customer is discriminatory against telephone subscribers who do not want their telephone numbers made public. Plaintiffs insist that the aforesaid order denies them equal protection of the laws, invades their constitutional right to privacy, and was made without affording them due process of law. Thus, plaintiffs, in substance, seek an order "permanently enjoining defendants from continuing to violate plaintiffs' rights" and "a refund . . . for all monies . . . paid pursuant to the order of the Commission effective December 14, 1971 . . . ."

Defendants Bell and Commission have moved, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss the complaint in this action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. In support of their motions, both defendants advance the following independent grounds allegedly requiring dismissal of this action: (1) the Johnson Act, 28 U. S. C. § 1342; (2) the exclusive "original and primary jurisdiction of the Pennsylvania Public Utility Commission; (3) the doctrine of federal-state comity; and (4) the lack of state action.

For reasons hereinafter set forth, we dismiss plaintiffs' action on the grounds that the court is without jurisdiction over the subject matter by virtue of the provisions of the Johnson Act, 28 U. S. C. § 1342, which limits its federal equity jurisdiction in the area of state rate orders, and on the basis that even assuming the Johnson Act to be inapplicable to this action and jurisdiction otherwise to exist, in its technical sense, pursuant to allegations set forth in plaintiffs' complaint, the court should, in conformity with the doctrine of federal-state comity, decline to exercise its jurisdiction.

II.

The Johnson Act.

The Supreme Court has admonished against federal equity interference in rate-making cases. *Public Utilities Com. v. United Fuel Gas Co.*, 317 U. S. 456, 63 S. Ct. 369, 87 L. Ed. 396 (1943); *Petroleum Exploration v. Public Service Com'n*, 304 U. S. 209, 58 S. Ct. 834, 82 L. Ed. 1294 (1938). See, *Tri-State Gen. & Transm. Ass'n. v. Public Serv. Comm'n of Wyo.*, 412 F. 2d 115, 119 (10th Cir. 1969), cert. denied, 397 U. S. 1043 (1970). The Johnson Act of 1934, 28 U. S. C. § 1342, is a restrictive statute and manifests a Congressional intent that federal jurisdiction should be seriously curtailed with regard to rate orders of State and local regulatory bodies. *City of Meridian, Miss. v. Mississippi Valley Gas Co.*, 214 F. 2d 525 (5th Cir. 1954); *DeKalb County v. Southern Bell Tel. & Tel. Company*, 358 F. Supp. 498 (N. D. Ga. 1972) aff'd 478 F. 2d 700 (5th Cir. 1973). See 1-A J. Moore, Federal Practice, ¶¶ 0.206, 0.207, pp. 2281-2283.

The Act provides that the district court shall not "enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a state administrative agency or a rate-making body of a state political subdivision where:

"(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and

(4) A plain, speedy and efficient remedy may be had in the courts of such State."

Since the conjunction "and" is used as the connecting word between the conditions, it is the general view that all four of the numbered contingencies must be found to exist before the Johnson Act can apply and thereby preclude the court's jurisdiction. The existence of one or more but less than all of the conditions is not sufficient. *David v. New York Telephone Company*, 341 F. Supp. 944, 947 (S. D. N. Y. 1972); *United States v. Public Utilities Commission of Cal.*, 141 R. Supp. 168, 183 (N. D. Cal. 1956), aff'd, 355 U. S. 534, 78 S. Ct. 446, 2 L. Ed. 2d 470 (1958).

It is clear that the Commission's December 14, 1971 order herein challenged is one affecting rates chargeable by a public utility, Bell. On page 17 of their brief, plaintiffs acknowledge that "[j]udicial interference with rate orders promulgated by state agencies is concededly precluded by the Johnson Act, 28 U. S. C. § 1342." However, plaintiffs insist that the order of the Commission interferes with interstate commerce, and was not made after reasonable notice and hearing. It is further urged that a plain, speedy and efficient remedy may not be had in the Pennsylvania courts.

It is appropriate for the court to consider separately the four statutory conditions to the operation of 28 U. S. C. § 1342.

(1) Basis for Jurisdiction.

The complaint alleges that jurisdiction arises under "The Civil Rights Acts and the United States Constitution." Plaintiff apparently is asserting jurisdiction pursuant to 28 U. S. C. § 1343(3), and 42 U. S. C. § 1983. The

aforesaid statutes require the presence of an act or action which is repugnant to the Federal Constitution before federal court jurisdiction will attach. Here, the first condition is satisfied since jurisdiction is premised on the Constitional repugnance of the Commission's order authorizing the 50 cent private number surcharge.

(2) No Interstate Commerce Interference

The courts have found that state agency orders applicable to intrastate telephone rates do not interfere with interstate commerce, and that the Johnson Act applies. *Preston County Light & P. Co. v. Public Serv. Com'n of W. Va.*, 297 F. Supp. 759 (S. D. W. Va. 1969); *General Telephone Company of Southwest v. Robinson*, 132 F. Supp. 39 (E. D. Ark. 1955); See, *Public Utilities Com. v. United Fuel Gas Co.*, supra, 317 U. S. at 469; and *Kansas-Nebraska Nat. Gas Co. v. City of St. Edward, Neb.*, 234 F. 2d 436, 440 (8th Cir. 1956).

Under the particular facts and circumstances of the instant case, involving private number regulation, which is a matter of local concern, we find that in the context of the Johnson Act, the Commission's order of December 14, 1971, with respect to the challenged 50 cents per month private number surcharge, does not interfere with interstate commerce. Accordingly, we conclude that the second condition of the Johnson Act is satisfied.

(3) Reasonable Notice and Hearing.

Plaintiffs argue that the December 14, 1971, ratemaking order of the Commission has not been made after reasonable notice and hearing and therefore is not subject to the Johnson Act. Plaintiffs insist in paragraph 24 of their complaint that "[n]o individual notice of the filing of said tariff was made, nor were plaintiffs given an oppor-

tunity to protest or to be heard prior to the imposition of the Private Number Surcharge."

In his affidavit, plaintiff, F. Donald Zucker, affirms, *inter alia*, that "the first time I was aware that Bell Telephone Company of Pennsylvania . . . intended to charge me for having an unlisted telephone number was when I received the first bill levying a charge of 50 cents a month for my unlisted telephone number. At that time, the Pennsylvania Public Utility Commission had already approved the new charge. I did not know that Bell had applied to the Utility Commission for the new rate." Plaintiff Zucker further declares that "I did not read in any newspaper account or any published notice in any newspaper of Bell's filing with the Utility Commission for the new unlisted telephone number rate. *At that time I subscribed to the Philadelphia Evening Bulletin and read the paper daily, but I was not notified through that media of the filing or the approval and imposition of the new rate.*" (emphasis added). Plaintiff Barton maintains in his affidavit that he did not know, or understand that he "could in any way protest the rate increase of Fifty Cents."

The numerous exhibits and affidavit submitted by defendants reveal the following:

Pursuant to the requirements of the Pennsylvania Public Utility Law and rules and regulations of the Commission numerous steps were taken to give notice. On December 3, 1970, Bell filed with the Commission tariff revisions together with a "Notice" of the changes they would effect. A copy of the tariff and "Notice" was available for public inspection beginning on December 3, 1970, and continuing through December 29, 1970, at Bell's headquarters and each of Bell's public offices, including its public offices at Pottstown, Pa. and Norristown, Pa., which serve Bell's subscribers in the areas of plaintiffs, Barton and Zucker, respectively. Bell posted in public view at each of the

aforesaid public offices placard notices [1] calling attention to the new tariffs and stating that they would be produced for examination upon request. Also, a printed letter over the signature of William S. Cashel, Jr., President of Bell, was sent by first class mail, on December 3, 1970, to each Bell customer. In the first paragraph, the letter indicated that

> "[T]he Bell Telephone Company of Pennsylvania has *filed with the Public Utility Commission increases and changes in rates* for local telephone service, including supplemental service, effective February 3, 1971. *The proposed new rate schedules are on file at each of the Company's Business Offices and may be seen upon request.*" (emphasis added).

In addition to the notice requirements of the Public Utility Law and the Commission's rules and regulations, Bell took further steps calculated to inform its customers of the December 3, 1970 tariff filing. Bell distributed to wire services, newspapers, and radio and television stations throughout its territory news releases which resulted in newspaper publicity and radio and television coverage. The following newspapers were circulated in or near the areas where plaintiffs reside, on the dates specified:

(a) Philadelphia "Inquirer"—December 4, 1970;

(b) Philadelphia "Evening Bulletin"—December 3, 1970;

---

1. NOTICE
New Tariffs to become effective
February 3, 1971
covering increases, decreases, and changes in Rates for Local Telephone Service including supplemental equipment and services, have been filed and posted in the offices of this Company and will be produced for examination upon request.

*

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

(c) Souderton "Independent"—December 9, 1970;

(d) Honeybrook "Herald"—December 9, 1970;

(e) Reading "Times"—December 4, 1970;

(f) Reading "Eagle"—December 3, 1970;

(g) Quakertown "Daily Free Press"—December 4, 1970;

(h) Coatesville "Record"—December 3, 1970;

(i) Chester County "Daily Local News"—December 3, 1970;

(j) Phoenixville "Republican"—December 3, 1970;

(k) Larsdale "North Penn Reporter"—December 3, 1970;

(l) Norristown "Times Herald"—December 3, 1970.

Bell also furnished Bell's customer contact employees, with detailed information regarding the said tariff filing which was to be given customers who were interested.

A careful review of the record, including the pleadings, exhibits and affidavits, submitted by all the parties, does not indicate that, under the particular facts and circumstances of the instant case involving administrative public utility rate proceedings, plaintiffs were not afforded what actually constituted reasonable notice and opportunity for a hearing complying with minimum standards of due process. Here, Bell filed tariff revisions and a notice of changes with the Commission on December 3, 1970, and simultaneously placed such tariff revisions and notice in all of its public offices for inspection by the public. On the same day, Bell sent to each of its customers a printed letter, over the signature of the president of the Company, stating that Bell had requested the Commission to approve in-

creases and changes in rates for telephone service and that the proposed rate schedules were available to the public for inspection at any of Bell's business offices. We note that the aforementioned steps undertaken by Bell were in full compliance with the notice requirements of the Public Utility Law [2] and the Commission regulations [3] promulgated thereunder.

Plaintiff Zucker acknowledges that he, in fact, "received from Bell a letter dated December 3, 1970", nevertheless he complains, *inter alia,* that the letter did not expressly advise him that he "could present testimony" and "question Bell's witnesses". Plaintiff further claims that he did not actually know and "did not think for a moment" that the statement in the letter revealing Bell's filing for "increases and changes in rates for local telephone service" meant that Bell was, for the first time, filing to charge him for private number service. In the court's view, the notice relating to increases and changes in rates sufficiently apprises a subscriber that a rate may be established for a service previously provided without charge. The fact that plaintiff Zucker, personally, may have misconstrued pertinent language in the letter and adopted an interpretation contrary to its plain import, does not demonstrate any

---

2. 66 P. S. § 1147 provides in relevant part as follows: "The public utility shall also give such notice of the proposed changes to other interested parties as the commission in its discretion may direct."

3. The pertinent portion of the Commission's "Rules and Regulations Governing the Filing, Content, Posting, and Other Matters Pertaining to Tariffs of Public Utilities Other Than Common Carriers (1962)" reads as follows:

"5. Upon the filing and posting of new tariffs or supplements to tariffs making increases in rates, notice thereof shall be given to the public in the following manner:

(a) by posting in offices

. . .

(b) by written or printed notice."

deficiency in the notice under the circumstances set forth herein.

The court must point out that the aforesaid letter was not the plaintiffs' only opportunity for learning of the rate case and for ascertaining that the company was seeking a charge for private number service. While it is maintained by plaintiff Zucker that he "did not read in any newspaper account . . . of Bell's filing with the Utility Commission for the new unlisted telephone number rate", it is undisputed that the newspapers in the area where each plaintiff resides, including the Philadelphia Evening Bulletin,[4] which plaintiff Zucker admittedly subscribes to and reads daily, carried articles discussing Bell's filing with the Commission and the proposed charges for private number service. The fact that F. Donald Zucker and Harry J. Barton may have been personally unaware of Bell's intention to file for changes and increases in rates, despite the utilization of numerous and varied procedures reasonably calculated,

---

4. On December 3, 1970, the Bulletin carried a report entitled "Bell Telephone Files Its Rates for $86 Million." A portion of the very extensive article read as follows:

> "The Bell Telephone Co. of Pennsylvania filed application today for a statewide rate increase which would yield an additional $86.3 million a year.
>
> Residential customers would pay anywhere from 25 cents to $3 more per month, depending on the type of service. But the company said the average would be about $1.20 a month.
>
> The application was filed with the Public Utility Commission in Harrisburg this morning.
>
> * * *
>
> 'Private' Numbers
>
> Bell also proposed to institute two new services called private and semi-private numbers with respect to listing in the directory, replacing the present 'nonpublished' offer.
>
> Under the private number proposal, for $1 a month subscriber's number would not be published in any directory nor would it be available from an operator.
>
> Under the semi-private proposal, the number would not be listed in any directory but could be obtained by calling the assistance operator. The monthly charge would be 50 cents."

under all the circumstances, to inform the rate-paying customers of such filing, cannot, in and of itself, preclude a finding of "reasonable notice", and so render the Johnson Act inapplicable.

Plaintiffs also contend that various measures undertaken by defendants after the approval of the rates, could have been utilized prior to the rate approval to more effectively notify Bell's customers of the rates for unlisted telephone numbers. Even if we accept this position, we do not believe that defendants' subsequent utilization of more efficient measures of notification renders the challenged notice inadequate or unreasonable. Plaintiffs rightly do not suggest that, the personal service of process required in many judicial actions is essential in a rate case involving over 3 million customers. Neither do plaintiffs argue that each rate paying customer was entitled to receive by mail copies of the multiple page tariff sheets and the 32 page "notice" filed with the Commission. In view of the enormous complexity of the subject matter and the millions of people to be informed, the method of notice employed was adequate to inform plaintiffs that new rates had been filed and that the specifics of the proposed tariff would be made available to them on request.

Under the circumstances of this rate case, the court concludes that for jurisdictional purposes, the Commission's order of December 14, 1971, was promulgated "after reasonable notice and hearing" within the meaning of subsection (3) of the Johnson Act, 28 U. S. C. § 1342; more than that is not required.

(4) State Court Remedy

There exists in the courts of Pennsylvania, available to plaintiffs, a plain, speedy and efficient remedy; accordingly interference with the Commission's order is barred by 28

U. S. C. § 1342. *Diggs v. Pennsylvania Public Utility Commission,* 180 F. 2d 623 (3rd Cir. 1950); *City of El Paso v. Texas Cities Gas Co.,* 100 F. 2d 501 (5th Cir. 1938) cert. denied, 306 U. S. 650, 59 S. Ct. 592, 33 L. Ed. 1049 (1939); *DeKalb County v. Southern Bell Tel. & Tel. Company,* supra; *Mountain States T. & T. Co. v. Public Util. Com'n of Colo.,* 345 F. Supp. 80 (D. Colo. 1972); *Mountain States T. & T. Co. v. Public Util. Com'n of Colo.,* 324 F. Supp. 857 (D. Colo. 1971); *Preston County Light & P. Co. v. Public Serv. Com'n of W. Va.,* supra; *New Jersey Suburban W. Co. v. Board of Public U. Com'rs,* 23 F. Supp. 752 (D. N. J. 1938). The court's examination of the Pennsylvania Public Utility Law, 66 P. S. §§ 1101 et seq., reveals that the remedies available to plaintiffs are sufficient.

The Public Utility Law in substance requires that every rate of a public utility be "just and reasonable"[5] and makes unlawful unreasonable discrimination in rates, as well as provides that no public utility shall "as to rates . . . subject any person . . . to any unreasonable prejudice or disadvantage."[6] Plaintiffs have a right to file a complaint with the Public Utility Commission claiming improprieties in any rate determination.[7] Pennsylvania law further provides for a customer class action and empowers the Commission to order a refund of unjust or unreasonable rates.[8] If the Public Utility Commission decides adversely

5. 66 P. S. § 1141.

6. 66 P. S. § 1144.

7. 66 P. S. § 1391.

8. 66 P. S. § 1153, provides in part as follows:

"§ 1153. Refunds

(a) If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authortiy to make an order requiring the public

to plaintiffs, they may appeal to the Commonwealth Court.[9]

8. (Cont'd.)
utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within two years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. In making a determination under this section, the commission need not find that the rate complained of was extortionate or oppressive. Any order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility. The commission shall state in any refund order the exact amount to be paid, the reasonable time within which payment shall be made, and shall make findings upon pertinent questions of fact."

9. 66 P. S. § 1431 provides:

"§ 1431. Appeals to courts; jurisdiction and practice

(a) Within thirty days after the service of any order by the commission, unless an application for a rehearing may be pending, and then within thirty days after the service of the order refusing such application, or the service of an order modifying, amending, rescinding, or affirming the original order, any party to the proceedings affected thereby may appeal therefrom. Such court is hereby clothed with exclusive jurisdiction throughout the Commonwealth for the purpose of hearing and determining any and all such appeals: Provided, That in case of an appeal from an award by the commission of compensation for damages resulting from an appropriation of real property under the provisions of this act, the appeal shall, in case any party is entitled to demand a jury trial under section eight of Article sixteen of the Constitution of this Commonwealth, be to the courts of the proper county thereof. In case of any such appeal from such an award where the commission shall have apportioned the amount thereof among, or shall have directed the payment thereof by, any public utility, municipal corporation or the Commonwealth, any such public utility, municipal corporation, or the Commonwealth may intervene and be heard in the trial of such appeal under such rules and regulations as the court shall prescribe. If an appeal be taken to any court, the case shall proceed in accordance with the practice and procedure made and provided in such cases.

(b) All appeals shall be by petition, setting forth specifically and concisely the error or errors assigned to the order of the commission, which petition shall be accompanied by a copy of the order appealed from, and shall also be accompanied by affidavit of the appellant, or of the agent or attorney of such appellant, that the appeal is not taken for the purpose of delay, but because the appellant verily believes that injustice has been done. Each error relied on must be specified particularly and set forth in a separate numbered paragraph of the petition."

The Pennsylvania Public Utility Law contains an elaborate scheme for appellate review of orders of the Public Utility Commission; thus the remedy in the courts of Pennsylvania is plain, speedy and efficient within the meaning of subsection 4 of 28 U. S. C. § 1342.

Since all four conditions enumerated in the Johnson Act are satisfied in this case, this court is precluded, from exercising jurisdiction which would interfere with the Commission's order challenged herein. See, *General Investment & Serv. Corp. v. Wichita Water Co.*, 236 F. 2d 464 (10th Cir. 1956); *Diggs v. Pennsylvania Public Utility Commission* supra; *David v. New York Telephone Company*, supra; *Mountain States T. & T. Co. v. Public Util. Com'n. of Colo.*, supra; *Preston County Light & P. Co. v. Public Serv. Com'n. of W. Va.*, supra; *Pudlik v. Public Service Company of Colorado*, 166 F. Supp. 921 (D. Colo. 1958); *General Telephone Company of Southwest v. Robinson*, supra; *New Jersey Suburban W. Co. v. Board of Public U. Com'rs*, supra.

III.

Comity.

It is well-established that a federal court should abstain from exercising its jurisdiction in order to avoid unnecessary conflict with the administration by a state of its own affairs. Thus, assuming arguendo that 28 U. S. C. § 1342 does not deprive the court of jurisdiction that may otherwise exist, the court nevertheless concludes that jurisdiction should not be exercised, and that this case must be dismissed for reasons of comity. *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U. S. 341, 71 S. Ct. 762, 95 L. Ed. 1002 (1951); *Burford v. Sun Oil Co.*, 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943); *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 61 S. Ct.

643, 85 L. Ed. 971 (1941); *Allegheny Airlines, Inc. v. Pennsylvania Pub. Util. Com'n.*, 465 F. 2d 237 (3rd Cir. 1972); *General Investment & Serv. Corp. v. Wichita Water*, supra; *Davis v. City of Little Rock*, 136 F. Supp. 725 (E. D. Ark. 1955); *General Tel. Co. v. Robinson*, supra.

In *Burford v. Sun Oil Co.*, supra, a case involving an attack on the validity of proration orders in Texas oil fields, on the ground, among others, that the orders denied to Sun Oil due process of law, the court held that the federal district court should have dismissed the complaint. The court found that the exercise of the district court's jurisdiction would have interfered with a unified and comprehensive state scheme for regulating a complex industry and that the issues involved a specialized aspect of a complicated regulatory system of local law, which should be left to the local administrative bodies and courts. In *Alabama Public Service Commission v. Southern Ry. Co.*, supra, the Supreme Court determined that the Johnson Act was inapplicable since the order challenged was not a rate order; nevertheless, the court decided that the district court should have declined to exercise its jurisdiction as a matter of sound equitable discretion. It was recognized that, in view of the strong underlying principle of avoiding "needless friction with state policies", the plaintiffs' rights should be "pursued through the state courts." 341 U. S. at 350, 71 S. Ct. at 768.

The doctrine enunciated in Burford and Alabama Public Service Commission has been followed by lower federal courts where the courts found the Johnson Act inapplicable. For example, in *City of Monroe, Louisiana v. United Gas Corporation*, 253 F. 2d 377 (5th Cir. 1958), the court found the Johnson Act applicable, and accordingly dismissed plaintiff's action which sought to enjoin rates fixed by a state agency. In the course of its opinion the court stated:

> "Of appellant's alternative primary contention, little need be said than that if, as the court did in the General Investment & Service Company case, 236 F. 2d at page 468, we should concede without deciding that Sec. 1342 did not deprive the court of jurisdiction, we must still conclude under the cases cited, *supra*, in support of that contention, that the court should have denied plaintiff the right to proceed in the federal court. [citing Alabama Public Service Commission]." 253 F. 2d at 381.

In *Davis v .City of Little Rock*, supra, the court dismissed the action under the doctrine of comity after finding that the Johnson Act did not apply. The Court said:

> "Although it does not appear that the ordinance here challenged was enacted after reasonable notice and hearing, it is obvious that the other three prohibitory conditions of the Act are present, and under such circumstances we think that the doctrine under discussion is particularly applicable, in the light of the clear Congressional policy expressed in the statute." 136 F. Supp. at 729-30 (Footnotes omitted.)

See, *General Investment & Serv. Corp. v. Wichita Water Co.*, supra; *Kansas-Nebraska Nat. Gas Co. v. City of St. Edward, Neb.*, supra; *City of El Paso v. Texas Cities Gas Co.*, supra; and *General Telephone Company of Southwest v. Robinson*, supra, 132 F. Supp. at 46, where the court stated that "[s]ince in the instant case at least three of the four conditions of the Act have been met, we feel that the situation presented is one to which the rule of comity is peculiarly applicable."

The Court of Appeals for this circuit has recently applied the doctrine of comity in a case similar to the one at

bar. In *Allegheny Airlines, Inc. v. Pennsylvania Pub. Util. Com'n*, supra, the court finding that the action posed a serious threat "to the orderly procedures and rules" of a state regulatory body, affirmed an order of this district court dismissing under the doctrine announced in *Burford* and *Alabama Public Service Comm'n*, supra, a challenge to an order of the Public Utility Commission. 465 F. 2d at 243.

Based on the foregoing, it is clear that dismissal is required by reason of comity.

IV.

Conclusion.

For reasons here set forth, we dismiss plaintiffs' action on the ground that the court's jurisdiction is precluded by 28 U. S. C. § 1342 and on the ground that, even if the action were not so precluded, the court would nonetheless decline to exercise such jurisdiction, pursuant to the doctrine of comity.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-2460

F. DONALD ZUCKER and HARRY J. BARTON, Individually and on Behalf of All Members of a Class of Customers Similarly Situated

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

and

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORDER.

AND Now, this 29th day of March, 1974, IT IS ORDERED that the motions of defendants, Bell Telephone Company of Pennsylvania and Pennsylvania Public Utility Commission, to dismiss plaintiffs' action be and the same are hereby GRANTED.

By THE COURT:
CLIFFORD SCOTT GREEN,
Clifford Scott Green, *J.*

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1496

F. DONALD ZUCKER and HARRY J. BARTON, Individually and on Behalf of All Members of a Class of Customers Similarly Situated,

Appellants

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

and

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. C. Civil No. 72-2460

ARGUED AT PHILADELPHIA JANUARY 20, 1975
Before MARIS, HASTIE and GIBBONS, *Circuit Judges*

JUDGMENT ORDER.

The above cause having come on to be heard and having been argued by counsel and the Court being of the

opinion, for the reasons set out in the opinion filed by Judge Green in the district court that the relief sought by the complaint is barred by the Johnson Act, 28 U. S. C. § 1342, and that the district court, in any event, rightly declined to exercise jurisdiction under the doctrine of federal-state comity,

It is Ordered and Adjudged that the judgment of the district court be and it hereby is affirmed with costs.

By THE COURT

ALBERT B. MARIS
Circuit Judge
Attest: THOMAS F. QUINN
Clerk

Dated: January 24, 1975

APPENDIX C.

§ *1342. Rate orders of State agencies*

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

APPENDIX D.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken

an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emanicipation of any slave; but all such debts, obligation and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SUPREME COURT, U. S.

MAY 23 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974, No. 74-1334

F. DONALD ZUCKER and
HARRY J. BARTON,
Petitioners

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA and THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974, No. 74-1334

F. DONALD ZUCKER and HARRY J. BARTON,
Petitioners,

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA and THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, IN OPPOSITION.

OPINIONS BELOW

The opinion of the District Court (Green, J.) dated March 29, 1974, dismissing the complaint is reported at 373 F. Supp. 748 (E.D. Pa. 1974). The decision of the Court of Appeals affirming the District Court's order is reported at 510 F.2d 971 (3d Cir. 1975). The Judgment Order of the Court of Appeals (Maris, Hastie, and Gibbons, JJ.) is set forth as Appendix B to the Petition.

QUESTIONS PRESENTED

1. Did the district court correctly apply the Johnson Act, 28 U.S.C. § 1342, which deprives the federal district courts of jurisdiction to interfere with rates for intrastate telephone service, which had been approved by a state administrative agency?

2. Did the district court properly exercise its discretion in declining, under the doctrine of comity, to take jurisdiction, if any, of a state regulatory matter of local concern, involving intrastate telephone rates?

3. Did the conduct of Bell Telephone Company in charging the rate attacked in this suit constitute "state action" for purposes of the Civil Rights Act, 42 U.S.C. § 1983?

4. Should a federal court assume jurisdiction over a matter which is comprehensively regulated by the Pennsylvania Public Utility Commission where a plaintiff has bypassed that state agency?

STATEMENT OF THE CASE

On December 3, 1970, The Bell Telephone Company of Pennsylvania (hereinafter "Bell Telephone"), pursuant to § 308 of the Pennsylvania Public Utility Law (66 Pa. Stat. Ann. § 1148), filed with the Pennsylvania Public Utility Commission revisions of its tariffs governing its various local intrastate telephone rates. Subsequent to the filing, the Commission instituted a full-blown investigation of the matter upon its own motion and upon the complaints of customers which had been filed opposing the proposed increased rates.

The Commission proceeding (hereinafter "rate case") generated fifteen days of hearings (from April 6, 1971, to August 12, 1971), and resulted in 2,683 pages of testimony and 154 exhibits. Twenty formal complaints were filed by parties other than the PUC, of which seven were withdrawn prior to the hearings. On December 14, 1971, after this exhaustive investigation, the Commission issued a 96-page order, part of which is the subject of plaintiffs' challenge herein. In its order the Commission approved the rates proposed by Bell for certain services and said it would accept others if revised in a specified manner. The rate in question in this case, Bell's 50-cent-per-month charge for private number service, is of the latter variety, having originally been filed as a $1.00-per-month charge.

On the same date as its filing with the Commission—December 3, 1970—Bell sent to each of its subscribers notice of the proposed rate increases in the form of a first class mail letter from Bell's President, informing them that Bell was in the process of requesting the Commission to approve various increases and changes in its rates, and indicating that a copy of the proposed new rate schedules was available for inspection upon

request. (A. 8) This individual notice to each customer was in addition to Bell's filing of the revised tariff provisions with the Commission, with notice of the changes sought, and the posting of notice for public view at each of Bell's business offices calling attention to the new tariffs and their availability for examination. (A. 7-8) And it was in addition to the widespread publicity in the news media that attended Bell Telephone's rate filing. (A. 8-12)

The complaint herein alleges, among other things, that the Commission's order of December 14, 1971, accepting a 50-cent-per-month charge for private number service was made without adequate notice and hearing, thus depriving petitioners of due process of law in violation of the fourteenth amendment, and the federal civil rights statutes. Bell Telephone's conduct in charging the rate attacked here is alleged to be "state action" and thus subject to constitutional scrutiny.

Bell Telephone moved in the District Court to dismiss the complaint on four grounds: (1) that the Johnson Act, 28 U.S.C. § 1342, deprived the court of jurisdiction; (2) that under the doctrine of comity the federal court should decline a matter of such peculiar local concern; (3) that the subject matter of the complaint was already comprehensively regulated by a state administrative agency where a remedy was available; and (4) that in any event, Bell Telephone's alleged conduct is not "state action" and thus not subject to general constitutional proscriptions or to the Civil Rights Act, 42 U.S.C. § 1983. The District Court granted Bell Telephone's motion on two grounds: that it was deprived of jurisdiction by the Johnson Act, and that the doctrine of comity required it to decline to exercise its jurisdiction even if the Johnson Act were inapplicable. In a short *per curiam* opinion

the Court of Appeals (Maris, Hastie, Gibbons, JJ.) affirmed on the same grounds.

The courts below, therefore, did not reach, and thus left undecided, the third and fourth grounds of Bell Telephone's motion, namely, the lack of "state action," and the fact that the tariff in question was the subject of comprehensive regulation by a state administrative agency. It is undisputed, however, that the decisions below were correct if any one of the four grounds of Bell Telephone's motion to dismiss is sound.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS IS OF NO GREAT SIGNIFICANCE AND IS CLEARLY CORRECT.

The subject matter of this lawsuit is nothing more than routine regulation of rates by a state administrative agency. Dismissal of this suit by the district court was required on four independent grounds, each of which involves the straight-forward application of long settled principles of law.

The district court below disposed of the case by relying upon two of four possible grounds, namely, the Johnson Act (28 U.S.C. § 1342) and the doctrine of comity. The Court of Appeals (by Maris, Hastie, Gibbons, JJ.) affirmed easily in a short *per curiam* opinion. The courts below correctly decided that the Johnson Act deprives the federal courts of jurisdiction in this case, which involves an "order affecting rates chargeable by a public utility and made by a State administrative agency." Moreover, the doctrine of comity, independent of the Johnson Act, is ample authority for dismissal.

But even these compelling reasons in support of dismissal do not exhaust the grounds supporting the judgment below. This action is brought under the Civil Rights Act of 1871 (42 U.S.C. § 1983), which applies only to the conduct of a state, or to the acts of one acting "under color of state law." *Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972). The conduct of Bell Telephone in charging the rate here under attack is clearly not "state action." Moreover, after the district court issued its opinion, this Court decided *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). Any open question on the "state action" issue was surely put to rest by that opinion.

Finally, the fact that petitioners have available remedies before the Pennsylvania Public Utility Commission under the comprehensive jurisdiction it exercises over the subject matter of this dispute is still a further reason for declining the petition. See, *e.g.*, *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963).

Each of these points will be dealt with briefly.

II.

THE JOHNSON ACT (28 U.S.C. § 1342) DEPRIVED THE DISTRICT COURT OF JURISDICTION IN THIS CASE.

Under the Johnson Act (now 28 U.S.C. § 1342)[1] the federal courts have steadfastly refused to interfere in the state rate-making process. See, *e.g.*, *Tennyson* v. *Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974); *DeKalb County* v. *Southern Bell Tel. & Tel. Co.*, 358 F. Supp. 498 (S.D. Ga. 1972), *aff'd per curiam*, 487 F.2d 700 (5th Cir. 1973); *Diggs* v. *Pennsylvania Public Utility Comm'n*, 180 F.2d 623 (3d Cir. 1950).

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[1] The Johnson Act (28 U.S.C. § 1342) provides:

"The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State."

Argument

In their petition for certiorari, petitioners concede the applicability of all the provisions of the Johnson Act, except subsection (3), which they contend was not satisfied because the Pennsylvania Public Utility Commission's order approving the rate at issue here was not made "after reasonable notice and hearing." (Petition for Writ of Certiorari, p. 11) This argument is without merit and was flatly rejected by the District Court after a complete factual analysis of the many forms of notice that were given to the public by Bell Telephone. (A. 6-12) The District Court found specifically that the notice was in "full compliance" (A. 10) with the Pennsylvania Public Utility Law and the Commission's Regulations, and the petitioners themselves have conceded that the notice was in conformity with the Commission's rules and regulations.[2] (Petition for Writ of Certiorari, p. 6; Appellants' Brief in the Third Circuit, p. 4)

Petitioners rely only upon the most broad and general statements of policy contained in the leading decisions of this Court on notice—*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Milliken* v. *Meyer*, 311 U.S. 457 (1940). Each of these decisions involved the notice required in judicial adjudicative proceedings, and plaintiffs have failed to cite a single case that stands for the proposition that that kind of notice is required in a rate-making proceeding involving over 3 million customers. All of the conditions of the Johnson Act have been met and this action was properly dismissed.

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[2] This alone is sufficient basis on which to find "reasonable notice and hearing" within the meaning of the Johnson Act. As the Tenth Circuit said in *Tennyson* v. *Gas Service Co.*, *supra*:

> "The Johnson Act does not engraft its own undefined standards of notice and hearing upon the rate making bodies of the several states but requires no more than that which is appropriate to an 'order affecting rates.'" (506 F. 2d at 1141).

III.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO DISMISS THE COMPLAINT UNDER THE DOCTRINE OF COMITY.

The doctrine of comity is a means by which the federal judiciary accommodates the interests of the state in matters which are of peculiar local concern, and is well established in the federal courts. *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

In *Alabama Public Service Comm'n* v. *Southern Railway Co.*, 341 U.S. 341 (1951), for example, this Court, although it found the Johnson Act inapplicable because the order attacked was not a rate order (341 U.S. at 350), upheld dismissal of the action on the basis of comity. The Court's opinion made short work of the argument that the federal courts are better equipped than state courts to protect constitutional rights (341 U.S. at 348-50), and concluded that, in view of the strong underlying principle of avoiding "needless friction with state policies," the plaintiff's rights should be "pursued through the state courts." (341 U.S. at 350).

The District Court here properly exercised its discretion. It acted well within the limits of the doctrine of comity, as developed by this Court and consistently followed by the lower federal courts. See, *e.g.*, *Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Comm'n*, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973); *Kansas-Nebraska Natural Gas Co.* v. *City of St. Edward*, 234 F.2d 436 (8th Cir. 1956).

Petitioners' confusion of the abstention doctrine embodied in *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), with the doctrine of comity is evident in their petition (p. 12). This is not a case where a point

of state law is in doubt and the federal court is asked to postpone disposition of the case before it until the state courts have resolved the question. See *Gibson* v. *Berryhill*, 411 U.S. 564, 574, 580 (1973). Petitioners fail to distinguish between that doctrine and the doctrine of comity, which requires the federal courts to stay out of matters of strong local concern entirely, and has nothing to do with doubtful points of state law.

IV.

BELL TELEPHONE'S CHARGING THE RATE ATTACKED IN THIS ACTION IS NOT "STATE ACTION".

Petitioners claim that Bell Telephone violated the fourteenth amendment of the Constitution and the "Civil Rights Acts." However, constitutional provisions and the civil rights statutes require "state action," and Bell's conduct here does not amount to that.

In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974)—decided after the district court's opinion here—this Court rejected the notion sought to be revived by petitioners that because public utilities have monopolies, or are highly regulated by the states, or receive state approval for many of their practices, their conduct is "state action." In *Jackson*, as here, plaintiff argued that the utility's conduct was "state action" and therefore subject to the restrictions of the constitution and the Civil Rights Act (42 U.S.C. § 1983). This Court disagreed:

> "The nature of governmental regulation of private utilities is such that a utility may frequently be required by that state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility com-

> mission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.' . . . Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." (419 U.S. at 357; footnotes omitted)

The *Jackson* decision is a complete bar to this action, for the conduct of Bell Telephone is charging the 50-cent-per-month rate for private number service is conduct of a private company only and is not subject to constitutional proscriptions.

V.

A FEDERAL COURT SHOULD NOT EXERCISE JURISDICTION OVER PUBLIC UTILITY TARIFFS COMPREHENSIVELY REGULATED BY A STATE ADMINISTRATIVE AGENCY.

Pennsylvania courts have long recognized that the regulation of intrastate telephone service, including the determination of the reasonableness of tariffs and utilities' practices thereunder, is within the exclusive jurisdiction of the Pennsylvania Public Utility Commission. See, *e.g.*, *Behrend* v. *The Bell Telephone Company of Pennsylvania*, 431 Pa. 63, 243 A.2d 347 (1968).

The Pennsylvania Public Utility Law (66 Pa. Stat. Ann. §1101, *et seq.*) creates a comprehensive scheme for the regulation of intrastate telephone service. The rate order attacked here was issued by the PUC after a lengthy rate proceeding, inquiring into the question of the fairness and reasonableness of the rates. This determination drew

heavily upon the expertise of the PUC in telephone utility regulation. Each rate in the tariff is inter-related to every other rate and to the fairness of the return which the utility is afforded the opportunity to earn on its property by the rates collectively. Consequently, if a federal court were to overturn a part of the tariff by declaring the 50-cent charge for private number service to be unlawful, this would not only deprive Bell of a significant amount of revenue, which the PUC found necessary in order to provide Bell a fair rteurn on investment, but would upset Bell's rate structure, and the Commission's delicate regulatory scheme.

The fact that the action of a public utility may raise issues of constitutional law has never been considered a reason for bypassing administrative agency jurisdiction. Administrative agencies, of course, frequently pass on evidentiary, procedural and substantive issues which have constitutional dimension, and their jurisdiction has not been held to depend on the existence or non-existence of such issues.

In the federal context, as well, challenges to a tariff, or its application, are consistently referred to the appropriate regulatory agency, at least for initial determination. See, *e.g.*, *Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966); *Nader* v. *Allegheny Airlines, Inc.*, 43 U.S.L.W. 2457 (D.C. Cir., May 2, 1975).

In sum, the relief sought by petitioners would involve an unwarranted intrusion by a court into an area of administrative agency jurisdiction,[1] and this is a further reason why the petition for certiorari should be denied.

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[1] It is beyond challenge that the Pennsylvania Public Utility Commission has full power to effect the relief sought here. See *Diggs* v. *Pennsylvania Public Utility Comm'n*, 180 F.2d 623 (3d Cir. 1950.)

CONCLUSION

For the foregoing reasons, the writ of certiorari should not be issued.

Respectfully submitted,

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May 23, 1975.